IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Appeal No.370 of 2002

Bharat @ Pintya Baburao Nerlekar — Appellant
Vs.
The State of Maharashtra & anr. — Respondents

Mr.Sai Kumar for appellant.
Mr.D.P.Adsule, APP for State.

CORAM : B.H.MARLAPALLE, J.

Reserved on : July 10, 2007.
Pronounced on : July 23, 2007.

JUDGMENT:

1. This appeal filed under Section 374 of Cr.P.C. arises from the order of conviction and sentence passed by the learned 5th Ad-hoc Assistant Sessions Judge at Kolhapur on 6/2/2002 in Sessions Case No.177 of 2001 for the offences punishable under Sections 376 and 452 of IPC. For the first offence the appellant has been sentenced to R.I. for ten years and to pay a fine of Rs.10,000/- in default to suffer S.I. for one year and for the second offence he has been sentenced to suffer R.I. for two years and to pay a fine of Rs.2000/- in default to suffer S.I. for three months. Both the sentences have been directed to run concurrently.

2. As per the prosecution the complainant Shivaji

Shankar Parit, PW 4 was the resident of village Shittur, Taluka Shalinwadi, Dist. Kolhapur and his family consisted of wife, daughter prosecutrix aged 11 years and son Akshay aged three years and the house of his parents was separate. Adjacent to his house was the house of his parents as well as his wife's brother's house was located there. His wife had gone to village Masur-Chikali on 18/4/2001 (Wednesday) for a festival. On 21/4/2001 he had left his house to go to his family near the village itself and at about 12 to 12-30 noon he received a message from Kumari Savita Anand Patil that his mother Dhondubai had called him home immediately and he, therefore, returned home and noticed that the prosecutrix was sleeping on the floor and his mother and sister were sitting near her. On his enquiry with his mother, she told him that the prosecutrix was suffering from severe bleeding and, therefore, she asked him to call a doctor. He went to the Rural Hospital at Shittur and at his request Dr. Satpute came to his house and on examination of the prosecutrix prescribed some medicines as well as gave one injection. Her clothes were soaked and, therefore, were changed. Dr. Satpute told him that her bleeding would stop but as a matter of precaution

she should be taken to a hospital at Karad. She was, therefore, taken to Ekopa Clinic at Karad where Dr.Suhas Deshpande - PW 9 admitted her at about 5 p.m. Sonography test was also done. On the next day i.e. on 22/4/2001 she regained consciousness and the complainant enquired with her regarding the reason of bleeding and he was told by her that at about 11 a.m. on the earlier day she had gone to her grand-mother's house, took her food and returned to her house. Her friend Savita had accompanied her. Within short time the accused entered her house and asked Savita to go out of the house and bolted the door from inside. The accused then took her on the folded bed, he pressed here mouth by his arm, removed her undergarment and committed sexual intercourse. The prosecutrix was discharged on 23/4/2001 at about 9 a.m. and Dr. Deshpande asked the complainant to take her to the Cottage Hospital at Karad along with all the papers and accordingly he went there. He was asked about whether the complaint was lodged with the police and thereafter he went to the Karad Police Station where he was asked to go to the police station at Shahuwadi where he lodged the complaint (Exhibit 20) which came to be registered as C.R.No.40/2001. She was sent for medical examination

and the accused was taken in custody on 26/4/2001. The clothes on her person as well as on the person of the accused were seized and were sent for chemical analysis. On completion of the investigation charge-sheet was filed on 2/7/2001 for the offences punishable under Sections 376 and 452 of IPC.

3. The prosecution examined the prosecutrix PW 1, Rajaram Dattatraya Ghatage - PW 2, Aba Ramchandra Parit - PW 3, Complainant Shivaji Shankar Parit - PW 4, Dr.Subhash Ramchandra Jagtap - PW 5, Tukaram Vithal Gurav - PW 6, Umesh Ramchandra Hajare - PW 7, Gajanan Hindurao Jadhav - PW 8, Dr.Suhas Suresh Deshpande - PW 9 and Dr. Sarita Babasaheb Thorat - PW 10. The statement of the accused under Section 313 of Cr.P.C. was recorded and he did not examine any witnesses in support of his defence. The accused denied his involvement in the alleged offence.

4. The prosecutrix in her examination-in-chief stated that she was studying in 7th standard and though the accused was resident of village Viral, he was staying in his matrimonial uncle’s house at village Shittur which was in the neighbourhood. On 21/4/2001 i.e. on the date of the incident she had

appeared for the last paper of her sixth standard examination in Science subject between 8 a.m. to 11 a.m. and thereafter she was alone in her house when her friend Savita joined her. Within short time the accused entered her house and threatened and sent Savita out of the house under threats and closed the door from inside. He pressed her mouth and took her on the cot, he removed her undergarment (nicker) and removed his trouser, he slept on her body, moved her for five minutes and inserted his penis in her vagina. Then he went away from her body. She started bleeding from her vagina and her friend Savita came in the house, both of them went to the rear side of the house and she washed herself. Her grand-mother Dhondubai came in the house and seeing the blood she asked her what had happened. She was afraid and, therefore, did not state anything. After sometime her aunt Kamal entered the house from the front door and both the grand-mother and the aunt asked what had happened. She did not disclose anything. They took her in the bathroom and washed her and sent a message for her father. The doctor was called in, who checked her and gave two injections. She was thereafter admitted in the hospital at Karad and on the next day she became

conscious when her father asked what had happened and she narrated the whole incident. She identified her frock and nicker in the Court. She also identified the clothes of the accused i.e. trouser and shirt (article nos.4 and 5) and stated that he had worn those clothes at the time of the incident. She identified the accused in the Court as being the same person who had raped her.

5. In the cross-examination she admitted that on the date of the incident she left her house at 7.30 a.m. and on completion of the examination she returned to her house and noticed that it was locked. She went and had food with her grand-mother and took the key of her house from her grandmother and entered her house. Immediately thereafter Savita came to her house which has two doors, one in front and the other at the rear side. The house of the accused was after one lane. When she and Savita were both in the house the rear door of the house was not closed. The accused entered her house from rear door after Savita had entered the house. She did not ask the accused as to why he entered the house or why he came there. Accused told Savita not to disclose anybody otherwise he would kill her. Savita did not reply. Under the

threats of the accused Savita went outside the house. Accused locked the door and she did not object and did not ask him why he was locking the door. She did not feel like running away from the rear side door of the house and did not give a call to any neighbours. When the accused lifted her on the cot, she did not shout. Though she wanted to cry loudly, her mouth was pressed. She did not try to escape from the clutches of the accused. When the accused left her, she did not cry or shout and he ran away from the rear door which was not bolted from inside when the accused raped her. Within five minutes Savita entered the house from the rear door and she was trying to hide the bleeding. Savita did not ask her what had happened and the prosecutrix did not want to disclose the same to Savita and within five minutes her grand-mother and aunt entered the house. She admitted to have felt that she should not show any bleeding to her grand-mother and though they were asking her about it. When Dr.Satpute came to check her, she was asked in the presence of her grand-mother. She did not tell the doctor what had happened. She was then taken to the hospital of Dr.Deshpande at Karad. She did not disclose to Dr. Deshpande as to what had happened. Even on the next

day Dr.Deshpande asked her but she did not disclose the incident. When the sonography was done she did not tell that doctor also about the incident. When her father lodged the complaint, the police did not ask her about the incident and she did not disclose anything to the police.

6. The chemical analysis report at Exhibit 10/C indicated that the blood group of the accused was "A" and no semen was detected on his trouser and shirt. No blood stains were detected on the pubic hair and nail clippings of the accused. The blood group of the semen of the accused could not be detected. The next CA report at Exhibit 11/C indicated that the blood group of the prosecutrix is "B" and no semen was detected on the vaginal swab. Dr. Subhash Jagtap - PW 5 is the Medical Officer from Rural Hospital at Malkapur and he stated that on 23/4/2001 he examined the prosecutrix at about 8 p.m. She was brought by Smt. Madiwal, lady police constable B.No.206 with police yadi dated 23/4/2001 with history of rape on 21/4/2001 for medical examination. He took the history of the patient and noted that the patient was discharged at about 9.30 a.m. on 23/4/2001 from a private hospital at Karad. On the

examination of the prosecutrix her mental status was normal, menstrual history - menarche not attended. The prosecutrix was averagely built and nourished. No external injury was noted on her body but on local external examination he noted the following injuries:

(1) Labia majoral : - Posterial commissor injured i.e. lacerated wound, tenderness present, no bleeding, healing present.

(2) Labia minoral : - Posterial union i.e. four-chette torn completely, size of injury is 1/2 cm. x 1/2 cm. x 1/2 cm. tenderness present. No bleeding, healing present.

(3) Hymen : - Completely torn irregular tag seen, tenderness present, no bleeding, healing present.

(4) Vagina : - Lower end of vagina i.e. posterior wall just left to midline torn size 1 cm. x 1/2 cm. x 1/2 cm. No bleeding, tenderness present, surface is healing, no discharge.

(5) Perineum : - Injured just left to midline size 1 cm. x 1/2 cm. x 1/2 cm. Tenderness present, no bleeding surface of fould, is healing.

All the injuries were joined to one another and as per him the prosecutrix was raped within 48 to 72 hours. For her age determination radiological examination was conducted at CPR Hospital, Kolhapur. He issued the medical certificate at Exhibit 22. On 28/4/2001 he examined the accused who was brought by Shri T.R.Kamble, Police Head Constable B.No.2/755. The accused was found to be able to do intercourse and accordingly MLC certificate at Exhibit 23 was issued. In his cross-examination he admitted that the prosecutrix's condition was normal. He denied the suggestion of tribadism that the prosecutrix indulged in with another girl. Dr. Suhas Deshpande - PW 9 stated in his examination-in-chief that on 21/4/2001 at about 5.30 p.m. the prosecutrix was brought to his hospital and he noticed that she was conscious oriented and apprehensive and was not giving any history and was not allowing any examination. The patient was suffering from sever pervaginal bleeding at the introitus. He also

admitted that on 21/4/2001 there was no complaint of rape either by the prosecutrix or her relations. The father had given the age of the prosecutrix as 13 years and, therefore, the same was mentioned in the letter at Exhibit 36. In his cross-examination he admitted that the relations of the prosecutrix had told that the there was menstrual blood loss in heavy form on 21/4/2001. The pulse and B.P. of the patient was normal. He had asked about her illness and complaint but she did not give any reply and at that time there was no active bleeding from introtoius. He also admitted that on 21/4/2001 there was no complaint of rape either by the prosecutrix or her relations. The father had given the age of the prosecutrix as 13 years and, therefore, the same was mentioned in the letter at Exhibit 36. PW 10 Dr.Thorat was the Medical Officer from December 2000 to 31/10/2001 at the CPR Hospital, Kolhapur. She had examined the prosecutrix on 25/4/2001 for age determination. On the basis of X-ray taken by Dr. Desai, Radiologist, the age of the prosecutrix was noted to be above 10 years and below 12 years and accordingly she issued the certificate at Exhibit 42. In the cross-examination she admitted that she was not present when the X-ray was taken by Dr.Desai.

. PW 6 Tukaram Vithal Gurav, Head Master of Central Primary School stated in his depositions that the prosecutrix was studying in the 7th standard. The school leaving certificate at Exhibit 25 was issued by his school and it was issued as per the record and as per the school register the date of birth of the prosecutrix was 15/10/1989. In his cross-examination he admitted that the prosecutrix was admitted in the school in the year 1995 and her date of birth was entered in the school register as per the information received from her guardian. He also admitted that in case of the prosecutrix the name of the guardian was not noted in the school record. Though the certificate at Exhibit 25 is claimed to be a school leaving certificate in Column No.8 the date of leaving the school was not mentioned and it appears that the school leaving certificate was issued on 12/12/2001 only for the purpose of bringing it before the trial Court to prove the age of the prosecutrix.

7. The evidence of PW 6 Tukaram Gurav, the Head Master of the Primary School read with the school leaving certificate (Exhibit 25) goes to prove that

the prosecutrix was born on 15/10/1989 and she was less than 12 years of age on the date of the incident. The medical evidence of Dr. Subhash Jagtap - PW 5 read with the medical certificate at Exhibit 22 issued on 28/4/2001 clearly indicated that the prosecutrix was examined on 23/4/2001 at about 8 p.m. and her hymen was completely torn irregular, it had suffered bleeding and healing was present. Posterial vaginal wall just left to the midline was torn in size 1 cm x 1/2 cm and though no bleeding was noticed, tenderness was present and surface healing was noticed. Libea minoral - posterial union i.e. fourchette torn completely, size of injury was 1/2 cm x 1/2 cm x 1/2 cm and tenderness was present, healing was noticed. On Labia majoral - lacerated wound was noticed and posterial commissor injured. The medical opinion as recorded at Exhibit 22/C clearly indicated that rape had occurred within 48 to 72 hours and PW 5 in his depositions before the trial Court reiterated the same opinion. He also stated that all the injuries noticed on the genital part were joined to one another and clearly indicated impressions of rape. The medical evidence thus proved that the prosecutrix was subjected to forced sexual intercourse by a male.

8. Now to connect the accused with the offence of rape committed on the prosecutrix, the prosecution has relied upon the evidence of panch witnesses in whose presence arrest panchanama and seizure panchanama of clothes was signed after the accused was arrested and the clothes on his person were seized on 26/4/2001. PW 2 Rajaram Ghatge deposed before the trial Court that on 26/4/2001 he was called at the Shahuwadi police station to act as panch and the accused was present in the said police station. The police arrested the accused before him and the accused handed over the clothes on his person by removing them and police seized the same. The clothes were a trouser, shirt and underwear and marked as Article nos.3, 4 and 5. He identified the same before the Court. He also stated that the blood stains and white spots were found on the underwear and shirt. He further stated that the police had written the panchanama as per the say of the witnesses and thereafter the witnesses signed the same. Shri Ravindra Madhukar Satpute was another witness. He identified his signature on the panchanama at Exhibit 15. He also identified the accused who was present in the Court. In his

cross-examination he stated that he he had studied upto 5th standard in Marathi medium but he used to sign in English. He was doing the labour work in village and sometimes in the police station. He denied the suggestion that he was a habitual panch of the police station though he admitted that before the learned JMFC of Malkapur he was panch on two-three occasions. He stated that he had signed the panchanama at Exhibit 15 at about 4.30 p.m. and on that day he had gone for labour work but not in the police station. He denied the suggestion that trouser, shirt and underwear were kept on the table and were not seized from the person of the accused. He also denied the suggestion that the accused was not arrested by the police in his presence. The prosecutrix in her depositions clearly stated that she knew the accused and he was staying just one house across the lane from her house. He was the resident of village Viral but was staying with his maternal uncle. Her statement that the accused was known to her and was acquainted could not be shaken in the cross-examination. She has in detail described as to how and at what time the accused entered her house from the rear door, asked her friend Savita to go out and bolted the front door

from inside. Though Savita has not been examined by the prosecution, the testimony of the prosecutrix is free from any doubts and there was no reason for her to implicate the accused on false charges. The defence could not bring any other ulterior motive in involving the accused in the offence of rape.

9. PW 4 in his examination-in-chief reiterated the statement made in the FIR that on 22/4/2001 at about 9 a.m. when the doctor asked the prosecutrix in his presence the reason for bleeding, she narrated the incident of rape committed by the accused in detail and started weeping. She had told that after she returned from the school and had food in her grandmother's house, she came back to her house along with her friend Savita and accused came in the house. He asked Savita to go outside the house, closed the door and took her on the cot where a mattress was kept in wrapped condition and he raped her after removing her undergarments. This disclosure made by PW 4 could not be disturbed or shaken in the cross-examination conducted by the defence though PW 4 in his cross-examination admitted that initially when he asked the prosecutrix the name of the person who had raped her, she did not disclose the name.

The prosecutrix disclosed that she was raped by the accused on 22/4/2001 for the first time. PW 8 Gajanan Jadhav was the ASI who had arrested the accused on 26/4/2001 under panchanama at Exhibit 15. He also stated that the accused was sent for medical examination on 28/4/2001. In his cross-examination PW 8 stated that the accused was working in the bakery of his maternal uncle.

11. It is also pertinent to note that the accused was a resident of village Viral and he was arrested on 26/4/2001 from village Shittur which is the village of the prosecutrix. The accused did not take the defence of alibi.

12. It is, therefore, clear that the prosecution proved beyond doubt the involvement of the accused in committing sexual intercourse on the prosecutrix on 21/4/2001 and the delay in his arrest or the chemical analysis reports regarding absence of semen stains on the undergarments of the prosecutrix has not in any way weakened the case of the prosecution. It has come in the reasoning of the trial Court that the prosecution tried its best to examine Savita but her father ensured that on the dates fixed before the

Court, she would not remain present in the village and, therefore, the learned Prosecutor was helpless. As noted earlier the evidence of the prosecutrix as recorded by the trial court is reliable, does not suffer from any improvements or exaggerations or omissions so as to make it doubtful in any manner regarding the involvement of the accused in committing rape on her. The order of conviction, therefore, calls for no interference and in fact the same is required to be confirmed.

13. Now coming to the issue of sentence it is to be noted that the accused was of 22 years of age on the date of the incident. When he entered the house of the prosecutrix, Savita and the prosecutrix were present. Though he entered from the rear door of the house, the prosecutrix did not take any objection and when he asked Savita to leave the house of the prosecutrix, the prosecutrix did not object to the same as well. She admitted in her cross-examination that she did not raise any alarm even though she was alone with the accused in her house after Savita left the same and the accused had bolted the main door from inside. She also admitted that when the accused lifted her, put her on the bed and removed her

undergarments, she did not raise any alarm. Even after he committed the sexual intercourse with her, she did not raise any alarm nor did she tell either to Savita or any of her family members regarding the said incident after the accused left her house and her grandmother and aunt noticed bleeding from her clothes. The father of the prosecutrix i.e. PW 4 has filed an affidavit in this appeal and stated that the prosecutrix was married in May 2006 and is living a happy married life. He has further stated that he and his daughter are not interested in pursuing the matter and he has absolutely no objection if this Court takes a lenient view for the appellant's release. Taking into consideration these obtaining circumstances, I am satisfied that the order of sentence passed by the trial Court and impugned in this appeal requires to be modified. The accused is in custody since 26-4-2001.

14. In the premises, the order of conviction and sentence as passed by the learned Vth Ad-hoc Asst. Sessions Judge, Kolhapur in Sessions Case No.177 of 2001 on 6/2/2002 and impugned in this appeal for the offence punishable under Section 452 of IPC is hereby confirmed. The conviction of the accused under Section 376(2)(f) of IPC is also hereby confirmed.

However, the sentence for the offence under Section 376(2)(f) is modified and the accused is sentenced to suffer RI for seven years and to pay a fine of Rs.1000/- in default to suffer further R.I. for 15 days. The accused will be entitled for the set off, as he is in custody since 26/4/2007. The appeal is thus partly allowed.

(B.H.MARL